

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

JULIAN VALDEZ-ARAGON,

Defendant.

Case No.: 2:10-CR-00089-GMN-LRL

ORDER

Before the Court is a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (ECF No. 70) filed by Petitioner Julian Valdez-Aragon. Also before the Court is Petitioner's Motion to Preserve Forensic Records (ECF No. 73) and his Request for Leave to Supplement Motion to Vacate, Set Aside or Correct Sentence (ECF No. 74). The Government filed a timely Response (ECF No. 75). Petitioner's Motion for Leave to File a Supplement (ECF No. 74) and to Extend Time to Reply (ECF No. 76) were both granted.

In its Motion to Preserve (ECF No. 73), Petitioner seeks an Order directing the Las Vegas Metropolitan Police Department (hereinafter "LVMPD") to "produce copies and preserve the originals of the log book and all the forensic reports for the analysis of the controlled substance seized in this case and examined by Forensic Scientist II, Jason Altnether, on or about February 25, 2010." (ECF No. 73).

FACTS

Petitioner was convicted, following a guilty plea, of possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(viii). (ECF No. 49) and filed the instant motion to vacate his sentence. (ECF No. 70). Defendant asserts that his

1 attorney provided constitutionally ineffective assistance by failing to challenge the chemist's
2 report with respect to the purity of the methamphetamine involved in the offense.

3 **LEGAL STANDARD**

4 To establish ineffective assistance of counsel, a petitioner must first show that counsel's
5 conduct was not "within the range of competence demanded of attorneys in criminal cases."
6 *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, a petitioner must also show that
7 he was prejudiced by that performance. See *Strickland*, 466 U.S. at 692.

8 Under this standard, the question is whether "counsel's representation fell below an
9 objective standard of reasonableness," and the Court's inquiry begins with a "strong
10 presumption that counsel's conduct [falls] within the wide range of reasonable representation."
11 *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1987) (as amended) (citations
12 omitted). The Supreme Court recently explained that courts evaluating ineffective assistance
13 claims "must apply a strong presumption that counsel's representation was within the wide
14 range of reasonable professional assistance" and that a petitioner must show that "counsel made
15 errors so serious that counsel was not functioning as the counsel guaranteed the defendant by
16 the Sixth Amendment." *Harrington v. Richter*, ___ U.S. ___, 131 S.Ct. 770, 787 (2011) (internal
17 citations and quotations omitted). Accordingly, "the standard for judging counsel's
18 representation is a most deferential one" because "the attorney observed the relevant
19 proceedings, knew of materials outside the record, and interacted with the client, with opposing
20 counsel, and with the judge." *Id.* at 788. Petitioner must also demonstrate that there is a
21 "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
22 would have been different." 466 U.S. at 694.

23 Rule 6(a) Governing Section 2255 Proceedings states in relevant part, as follows:

24 (a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct
25 discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in
26 accordance with the practice and principles of law. If necessary for effective

1 discovery, the judge must appoint an attorney for a moving party who qualifies to
2 have counsel appointed under 18 USC 3006A.

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4 (b) Requesting Discovery. A party requesting discovery must provide reasons for the
5 request. The request must include any proposed interrogatories and requests for
6 admission, and must specify any requested documents.

7 **ANALYSIS**

8 Petitioner claims that his counsel was ineffective for failing to object to the
9 determination that the methamphetamine mixture was the equivalent of 671.85 of “pure”
10 methamphetamine and cites to Baylor v Stelle, 94 F.3d 1321, 1323-24 (9th Cir. 1996). (ECF
11 No. 70 at 5, ECF No. 74-1 at 7). Petitioner asserts that when he specifically requested that his
12 counsel “object to this finding and request another lab examination from our own chemist,” his
13 counsel rejected the request because the analysis was unquestionable. Id. However, after his
14 subsequent review of the discovery, Petitioner asserts that, “the calculation of the “pure”
15 methamphetamine weight and the manner in which the LVMPD Forensic Laboratory(sic) tested
16 the drug purity were disputable. For example, the discovery at hand shows that the chemist
17 mixed the contents of three bags together and performed a single purity test, rather than doing
18 an individual test to each bag, thus, the reliability of the test was disputable.” (ECF No. 70 at
19 6)(emphasis in original).

20 In his Supplement, Petitioner additionally questions the reasonableness of the lab report
21 which he interprets as indicating that the total amount of methamphetamine taken from three
22 different bags was 671.85 grams, yet after testing, all 671.85 grams were determined to be
23 100% pure. (ECF No. 74-1 at 6) Petitioner cites to U.S. v. Alfeche, 942 F.2d 697, 699 (9th Cir.
24 1991) and U.S. v. Bogusz, 43 F.3d 82, 83 (3rd Cir. 1994) to support his argument that
25 “manufactured methamphetamine is not 100% pure regardless of the sophistication of the
26 equipment.” (ECF No. 74-1 at 6).

1 As an addendum to his supplement, Petitioner provides one page from the Government's
2 discovery, a summary "Report of Examination" in which the forensic scientist who tested the
3 methamphetamine reports that he received 3 packages containing 671.85 grams, completed an
4 examination and identified the three packages to contain 100% methamphetamine. (ECF No.74-
5 1 at 10). Petitioner further provides a letter from the police department in response to
6 Petitioner's request for "the log book report for the analysis of the controlled substance that was
7 examined..."which states that a court ordered subpoena is required.(ECF No 74-1 at 13).

8 At Petitioner's sentencing hearing, the Court followed the recommendation of the
9 Probation Office in the Presentence Report regarding the calculation of the Base Offense Level
10 at Level 36 pursuant to U.S.S.G. § 2D1.1(c)(2) because the actual amount of methamphetamine
11 possessed was at least 500 grams but less than 1.5 kilograms –specifically finding the 690 gross
12 grams of methamphetamine was the equivalent of 671.85 grams of methamphetamine.
13 Therefore, Petitioner would have to demonstrate that there is a "reasonable probability that, but
14 for counsel's unprofessional errors," the amount of methamphetamine would have been shown
15 to be less than the equivalent of 500 grams of pure methamphetamine and "the result of the
16 proceeding would have been different."

17 The Government's Response opposes Petitioner's request for discovery citing to Rule 6
18 and Shah v. U.S., 878 F.2d 1156, 1161 (9th Cir. 1989) noting that the Petitioner provides
19 nothing which demonstrates or even suggests that the contents of the three bags were mixed and
20 tested for purity together in one test. (ECF No. 75 at 7-8). The Government also argues that
21 even if only one test were performed, Petitioner has failed to demonstrate that the results of
22 testing three packages separately would have been different. Id. The Government questions the
23 Petitioner's reference to the Third Circuit's decision in U.S. v. Bogusz, arguing that the
24 statement "manufactured methamphetamine is not 100% pure regardless of the sophistication of
25 the equipment" is *dicta* with no explanation. (ECF No. 75 at 9).

1 The Court finds that the Petitioner has met its burden to establish good cause pursuant to
2 Rule 6(a) and hereby grants Petitioner's Motion to Preserve (ECF No. 73).

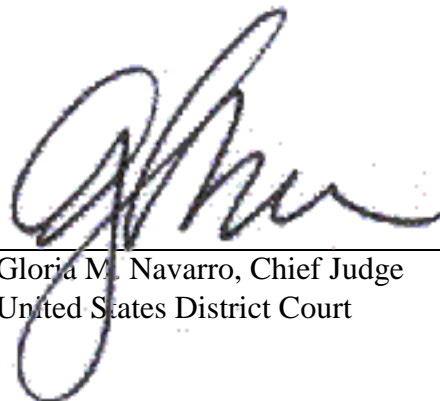
3 **CONCLUSION**

4 Accordingly, the Court hereby ORDERS the Las Vegas Metropolitan Police Department
5 to produce copies and preserve the originals of the log book and all the forensic reports for the
6 analysis of the controlled substance seized in this case and examined by Forensic Scientist II,
7 Jason Altnether, on or about February 3, 2010, signed February 25, 2010, for subject Julian
8 VALDEZ, Case 10 0215-3558."

9 **IT IS SO ORDERED.**

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11 **DATED** this 22nd day of January, 2014.

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Gloria M. Navarro, Chief Judge
United States District Court